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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 726

BURLINGTON-CHICAGO CARTAGE, INC.
Appellant,

vs.

UNITED STATES OF AMERICA,
and
INTERSTATE COMMERCE COMMISSION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the Interstate Commerce Commission is reported in 58 M. C. C. 465 and is set forth in Appendix A, *infra*, p. 13.

The opinion of the United States District Court for the Southern District of Illinois is reported in 178 F. Supp. 857. The Court's opinion is set forth in Appendix C, *infra*, p. 34.

JURISDICTION

1. This is an action to annul, vacate and set aside that portion of a report (Appendix A, *infra*, p. 13) and order (Appendix B, *infra*, p. 32) of the Interstate Commerce Commission which decided that plaintiff is entitled to make only one-way, westbound, movements with respect to certain intermediate and off-route operating rights acquired by plaintiff. The complaint also asks the Court to require the Commission to hear and determine said issue *de novo*. The action was brought under Title 49 of the United States Code, Sections 17(9), 305(g) and 305(h); and Title 28 of the United States Code, Sections 2321 to 2325, inclusive, and Section 2284.

2. The judgment of the District Court sought to be reviewed was entered November 30, 1959 (Appendix D, *infra*, p. 44). Notice of appeal was filed in the United States District Court for the Southern District of Illinois (Northern Division) on January 15, 1960.

3. Jurisdiction to hear this appeal is conferred upon this Court by Section 1253 of Title 28 of the United States Code.

4. The following cases sustain the jurisdiction of this Court to entertain a direct appeal from an order of a district court of three judges:

Radio Corporation of America et al. v. United States et al., 341 U. S. 412 (1951);

American Trucking Associations, Inc., et al. v. United States et al., 326 U. S. 77 (1945).

STATUTES INVOLVED

Section 10 of the Administrative Procedure Act (Act of June 11, 1946, C. 324, 60 Stat. 237, as amended; United States Code Title 5, Section 1009(e)) provides in part as follows:

> "(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law * * * and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by either party, and due account shall be taken of the rule of prejudicial error."

QUESTIONS PRESENTED

The following questions are presented by the appeal herein:

1. Whether the defendant Interstate Commerce Commission erred in its decision of June 23, 1952 (Appendix A, *infra*, p. 13), in deciding that the certificate of public convenience and necessity of C. H. Smith being purchased by plaintiff granted only a one-way, westward, service right with respect to the intermediate and off-route points designated in the certificate.

2. Whether the Commission's action was so plainly erroneous and unwarranted as to show that (a) plaintiff was not afforded a fair and impartial hearing and that (b) the requirements of the Administrative Procedure Act (Title 5 United States Code, Section 1001 *et seq.*) were not met.

3. Whether plaintiff, by consummating the purchase transaction with Smith following the Commission's decision, thereby became estopped from attacking that part of the decision which erroneously interpreted the Smith certificate.

STATEMENT

How the Controversy Arose

Plaintiff is an interstate motor vehicle common carrier of property. It entered into a contract to purchase certain operating rights held by one C. H. Smith, doing business as Chicago-Nebraska Motor Express. The contract was conditioned upon approval by the Interstate Commerce Commission.

To gain such approval, plaintiff and Smith, on November 2, 1949, filed with the Commission an appropriate joint application in the premises. Following the hearing thereof the Commission, on August 14, 1950, denied the application.[1] On rehearing, however, the Commission reversed itself and, on June 23, 1952, entered its report and order approving the purchase transaction (Appendices A and B, respectively, *infra*, pp. 13, 32). It is in connection with this decision that the controversy herein arose. The dispute between plaintiff and the defendant Commission stems from the certificate of public convenience held by Smith and purchased by plaintiff. The pertinent part thereof reads as follows:

> "*General Commodities* * * *, over regular routes, From Chicago, Ill., to Hastings, Nebr., as follows:
> * * *

[1] None of the facts in the controversy at bar is disputed.

Return, with no transportation for compensation except as otherwise authorized, over these routes to Chicago.

Service is authorized to and from the intermediate points of Peoria, Rock Island, and Moline, Ill., Davenport and Council Bluffs, Iowa and Omaha, Lincoln, and Fairmont, Nebr., and the off-route points of Canton, Ill., Clinton, Iowa, and Beatrice, Nebr."

No controversy arose as to the meaning of the words in the certificate "From Chicago, Ill., to Hastings, Nebraska." Clearly a right to perform only a one-way service is spelled out—from the origin point of Chicago to the destination point of Hastings. It is with respect to the meaning of the certificate language authorizing service in connection with the specified intermediate and off-route points that the question had its rise.

In its report of June 23, 1952, approving the purchase transaction the Commission, although conceding that for years Smith and his lessees (as well as plaintiff under temporary authority) had been operating in *both* directions with respect to said points, and that all the parties—including the opposition carriers—construed the Smith certificate as granting such right, held that service could be performed "on westbound traffic only." (Appendix A, *infra*, pp. 13, 29-30).

Thereafter, in an effort to correct the Commission's said error, plaintiff timely filed a petition for reconsideration asking that the decision be modified so as to permit both east and westbound traffic with respect to these intermediate and off-route points. This, the Commission on January 5, 1955, denied.

On September 23, 1953, the Commission reissued to plaintiff a consolidated certificate of public convenience, including the rights purchased from Smith.

All as alleged in the complaint and admitted in the answers, plaintiff made still further efforts to obtain administrative relief before the Commission by filing (April 11, 1958) a petition for clarification with respect to said matter (denied July 29, 1958); and by filing (August 27, 1958) a petition for reconsideration of the last-mentioned petition (which was denied by the Commission December 10, 1958). That was the end of the administrative proceedings.

Thereafter, on May 26, 1959, plaintiff commenced this action in the District Court.

Basis of the Commission's Decision

The Commission's report of June 23, 1952 (Appendix A, *infra*, p. 13) is fairly voluminous. Only a small portion thereof, however, deals with the matter involved in the controversy at bar. Before quoting that part, it should be explained that by the term "Tri-Cities" (as elsewhere shown in the report), the Commission was referring to the intermediate points of Rock Island, Moline, and Davenport; and that "Ross, Ross and Kornfeind, Kornfeind" were persons who previously had operated the Smith rights as lessees.

In its said report the Commission said (Appendix A, *infra*, pp. 29-30):

> "The *evidence shows clearly that for a number of years eastbound service, especially from Omaha and the Tri-Cities*, was performed by *Ross, Ross and Kornfeind, Kornfeind, and now vendee, under the Smith rights*, although the volume of traffic hauled on eastbound movements has been small as compared with the volume transported westbound. Vendee, under the temporary authority, has performed both westbound and *eastbound* service, particularly between Omaha and Chicago, because it construes the certificate *as authorizing two-way service be-*

tween all points permitted to be served, except that a return movement may not be performed from Hastings. *This seems to have been the interpretation placed upon the certificate by all the carriers operating under these rights.* We are unable to agree with this interpretation of the certificate. In our opinion, the certificate is without ambiguity in authorizing one-way service from Chicago westward to Hastings, with service to and from the specified intermediate and off-route points *on westbound traffic only*. To illustrate, vendee may originate a shipment in Chicago for delivery in the tri-Cities and Omaha, and in those points for movement to Lincoln, but it may not originate a shipment at any one of the specified intermediate and off-route points for eastbound service. In other words, beginning in Chicago the certificate permits only the transportation of freight to and from all intermediate and off-route points in a westerly direction toward Hastings. Vendee should promptly take steps to bring its operations in conformity with the service authorized by the certificate. * * *. Since only westbound service may be performed under the Smith certificate, it will not be necessary to consider further the contention stressed by *interveners* in their exceptions *that operations by vendee would further unbalance their eastbound movements*." (Our italics)

It is the position of plaintiff that the Commission's construction of the Smith certificate with respect to said intermediate and off-route points, *viz.*, that only one way, westbound, service may be accorded, is clearly erroneous as being at variance with the express words in the certificate.

The Questions Regarding the Scope of the Commission's Powers are of Substantial Importance

The question of interpretation involved here is a substantial one, not only from the standpoint of plaintiff's individ-

ual rights but from the standpoint of the trucking industry, as well. In so far as plaintiff's individual interests are concerned it is fairly apparent that the matter is of great importance to it. This is so because, under the Commission's restrictive interpretation with respect to these numerous intermediate and off-route points, plaintiff may provide a for-hire service only westward from Chicago. This requires plaintiff to return its equipment to the east empty, or "deadhead." The return movement obviously is a wasteful operation because it deprives plaintiff of revenue and deprives the shipping public of transportation service which otherwise would be available to it.

From the viewpoint of the trucking industry the controversy is important in this way: The certificates of convenience and necessity issued interstate motor vehicle common carriers by the Commission are the fountain source and life blood of any carrier's operation. Plaintiff submits, therefore, that the trucking industry as a whole has a stake in the controversy because the over-all issue is whether the Commission has the statutory power, by arbitrary interpretation, to strike important property rights from a certificate which previously had been conferred in plain and express words.

The Commission's Decision is Plainly Erroneous and Arbitrary

The Smith certificate provides for the transportation of general commodities "From Chicago, Ill., to Hastings, Nebr." It then says, "Return, with no transportation for compensation *except as otherwise authorized*, over these routes to Chicago." Immediately following these words the certificate says:

"Service *is* authorized *to and from* the intermediate points of Peoria * * * and the off-route points of Canton * * *." (Our italics)

Had it been the intent of the Commission, in granting Mr. Smith's certificate to him years ago, to restrict his service to one way, westward; movements with respect to these intermediate and off-route points, it would have been easy to say so in the certificate. The Commission could have worded the certificate to read "Service is authorized *to*[2] the intermediate points * * * and off-route points * * *." Or, the Commission could have said "Service is authorized *westward* to and from the intermediate points * * * and off-route points * * *." This, however, the Commission did not do. Since the language of the certificate contains no restriction, it is plaintiff's contention that none was intended. Especially when the phrase "to and from" is construed in light of and in context with the preceding language found in the certificate it appears that the only rational conclusion which may be reached with respect to its meaning is that service is authorized in *both* directions, not just "westward," as the Commission decided.

While of course the interpretation placed upon the certificate by Smith, by Smith's prior lessees, and by plaintiff—all of whom thought a two-way operation was permissible—would have no binding effect upon the actual meaning of the certificate, nevertheless it shows how the average man in the industry interpreted the plain English words "to and from" appearing in the certificate. As the Commission's report shows, furthermore, even the opposition carriers, who were seeking to block the application proceedings, were of the view that the Smith certificate permitted two-way

[2] A definition of the word "to" in Webster's New Int. Dictionary (2d Ed., 1959) is: "In one direction in alternation with the opposite."

transportation with respect to the intermediate and off-route points in question here.

Plaintiff is not unmindful of the fact that, as the decisions hold, the courts recognize the expertise of administrative agencies in their own particular field and consequently accord considerable weight to the interpretations and decisions of such bodies, including of course the defendant Commission. On the other hand, it is submitted by plaintiff that the problem at hand does not rightfully fall within that category. This is so because the interpretation of the Commission assailed herein involves such common everyday words as to afford no room for "expert" opinion as to their meaning. In any event, regardless of the skill of the Commission in the premises, it exceeded its authority when in effect it decided, as here, that the phrase "to and from" means precisely the same as the word "to."

For these reasons plaintiff urges that the decision of the Commission in the respect complained of is plainly erroneous and arbitrary and of such a character as to afford plaintiff the protection provided by the Administrative Procedure Act, 5 United States Code Sections 1001, 1009(e). See *East Texas Motor Freight Lines, Inc., et al. v. Frozen Food Express et al.*, 351 U. S. 49, 54 (1956); *Chicago M., St. P. & P. R. Co. v. Moultte Peat Products, Ltd., et al.*, 253 F. 2d 449, 454 (9th Cir. 1957); *Grace Line, Inc. v. Federal Maritime Board*, 263 F. 2d 709, 711 (2d Cir. 1959).

Plaintiff is not Estopped from Challenging the Decision

Another question which will arise is this: Assuming plaintiff is correct in its contention that the Commission's action is erroneous, is plaintiff estopped from complaining by virtue of having consummated the purchase transaction

with Smith, following the Commission's decision of June 23, 1952 (Appendix A, *infra*, p. 13)? Plaintiff submits the question must be answered in the negative. The Commission's decision shows affirmatively that plaintiff thought Smith's certificate permitted two-way operation in connection with said intermediate and off-route points. Therefore it must be assumed plaintiff considered such two-way rights as part of the bargain of the contract of purchase. It necessarily follows that when the Commission erroneously by interpretation cut out a substantial portion of the Smith rights, plaintiff, upon consummation, clearly got less than it bargained for.

Plaintiff therefore sees no reason why, when confronted with the Commission's decision of June 23, 1952 (which was more than two and a half years after the application was filed with the Commission) plaintiff was then put to an election of either abandoning the Smith transaction or else, as it did, going ahead with the deal—in the hope of getting the error corrected by the Commission at a later date, even if appropriate court action might be required. By taking such a course it is apparent that the rights of others could not be adversely affected thereby. The prerequisite elements of estoppel therefore are lacking.

CONCLUSION

For the reasons stated above it is respectfully urged that—

1. The Commission's said action is so clearly erroneous and arbitrary that it must be vacated and set aside and the matter ordered remanded to the Commission for hearing *de novo*.

2. By consummating the purchase transaction plaintiff did not thereby estop itself from seeking to have the Commission's error corrected.

3. The questions raised in this appeal are so substantial as to deserve plenary consideration by this Court, with opportunity for briefs and a hearing on the merits.

Respectfully submitted,

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APPENDIX A

INTERSTATE COMMERCE COMMISSION

No. MC-F-4324

R. J. Hurst and D. H. Hurst—Control; Burlington-Chicago Cartage, Inc.—Purchase—C. H. Smith

Submitted July 24, 1951. Decided June 23, 1952.

Upon further hearing, purchase by Burlington-Chicago Cartage, Inc., of the operating rights of C. H. Smith, doing business as Chicago-Nebraska Motor Express, and acquisition by R. J. Hurst and D. H. Hurst of control of the operating rights through the proposed purchase, approved and authorized, subject to conditions. Findings in prior report 56 M.C.C. 739, reversed.

Additional appearances:

Harold G. Hernly for applicants.

Russell James, Donald Mackay, Laurence W. Moore, and *S. F. Pavelec* for interveners in opposition.

Edward H. Norton for interested party.

Report of the Commission on further hearing

Division 4, Commissioners Mahaffie, Johnson, and Cross

By Division 4:

Joint exceptions by protestants, and separate exceptions by Frank Kornfeind were filed to the proposed report of the examiner on further hearing, which recommended approval of the application, and applicants replied.

In the prior report, 56 M.C.C. 739, decided August 14, 1950, we denied the application of Burlington-Chicago Cartage, Inc., of Kewanee, Ill., and C. H. Smith, doing business as Chicago-Nebraska Motor Express, of Omaha, Nebr., for authority under section 5 of the Interstate Commerce Act for purchase by the former of the motor carrier operating rights of the latter for $12,000, and of R. J. Hurst and his wife, D. H. Hurst, of Kewanee, who jointly control vendee through equal ownership of all its outstanding capital stock, for authority under the same section to acquire control of the operating rights through the purchase by vendee. It was found in that report that the purchase of the considered rights, to which no good will or going concern value was attached and the reinstitution of a service thereunder by vendee, in competition with existing carriers, would not be consistent with the public interest.

Prior to that report, an application filed by applicants on November 4, 1949, under section 210a(b) seeking temporary authority for lease by vendee of the operating rights of Smith, which it here proposes to purchase, was denied by order entered December 7, 1949. However, upon petition by applicants for reconsideration of that order, an order was entered March 6, 1950, authorizing vendee to lease Smith's rights for a period expiring September 1, 1950, at a rental of not exceeding $100 a month, which would be applied on the purchase price. Operations under this temporary authority were commenced by vendee on March 20, 1950. Thereafter, upon petition by applicants, an order was entered on October 31, 1950, authorizing vendee to continue the temporary operations granted by the order of March 6, 1950, as extended by order of August 14, 1950, until the application for authority under section 5 is finally determined, and the proceeding was reopened for further hearing. A joint petition by 18 of the 22 intervenors requesting reconsideration of the order of March 6, 1950, was denied November 6, 1950.

The further hearing has been held. The motor common carriers of property in interstate or foreign commerce which

intervened in opposition at the first hearing[1] and one other motor common carrier of property, Independent Truckers, Inc., opposed the application at the further hearing and cross-examined applicants' witnesses, but did not present additional evidence. Bekins Van Lines Co., herein called Bekins, a motor common carrier of household goods, conditionally opposed the application at the first hearing, but it did not appear at the further hearing. Upon petition filed October 31, 1949, Frank Kornfeind and William G. Ross, partners, doing business as Chicago-Nebraska Motor Express, herein called the partners, by order of December 5, 1949, were granted leave to intervene, but they did not appear at the first hearing. Ross and Kornfeind, as individuals, were present at the further hearing in response to subpoenas requiring their presence, and Kornfeind entered an appearance through counsel. Joint briefs on further hearing were filed by applicants and by 18 of the intervenors named in footnote 1.

The motor common carrier operations of applicants, the evidence adduced at the first hearing by the previously named 14 interveners, and other pertinent facts concerning the proposed transaction, are set forth in the prior report and will be restated herein only to the extent necessary for a clear understanding of the issues involved.

[1] Burlington Truck Lines, Inc., Carstensen Freight Lines, Inc., Dohrn Transfer Company, Interstate Dispatch, Inc., Western Transportation Company, John F. LaMere and M. J. Conroy, partners, doing business as Gordy Freight Lines, Kenneth Lees, Donald Lees, and Ray G. Wheeler, partners, doing business as Tri-Cities Motor Freight, Matthew Leo McKeone, Sr., Matthew Leo McKeone, Jr., Joseph James McKeone, and Albert Joseph McKeone, partners, doing business as Red Ball Transfer Company, Merchants Motor Freight, Inc., Peoria Cartage Co., Prucka Transportation, Inc., Rock Island Transfer and Storage Company, Union Transfer Company, doing business as Union Freightways; Watson Bros. Transportation Co., Inc., Des Moines Transportation Company, Hayes Freight Lines, Inc., Iowa-Nebraska Transportation Co., Inc., Pioneer Motor Service, On-Time Transfer, and Harold E. Strum, doing business as Strum Freightways, of which the first 14 presented evidence at the first hearing.

Vendee, an Illinois corporation, operates under a certificate issued October 21, 1949, in MC-102608, as a motor common carrier of general commodities, with exceptions, over regular routes, between Keokuk, Iowa, and Chicago, Ill., via Burlington, Iowa, and Galesburg, Kewanee, and La Moille, Ill., and also between Burlington and La Moille via Muscatine and Davenport, Iowa, with service to and from specified intermediate and off-route points, including the off-route point of Ottumwa, Iowa. It is also authorized to transport over irregular routes (1) general commodities, with exceptions, between Burlington, on the one hand, and, on the other, The Iowa Ordnance Plant, near West Burlington, Iowa, and between Galesburg, on the one hand, and, on the other, points in eight specified Illinois counties, and (2) specified commodities,[2] from and to, or between, points and areas in Illinois, Iowa, and Nebraska. On May 5, 1950, in No. MC-10260 (Sub-No. 6) a certificate was issued to vendee authorizing the transportation of general commodities, with exceptions, to and from Galva, Ill., as an intermediate point on the above-described regular routes. It has a pending application under section 207 in No. MC-102608 (Sub-No. 8) for authority to operate between Kewanee, on the one hand, and, on the other, points in the same eight Illinois counties.

Smith holds in his name a certificate issued to him on April 20, 1949, in No. MC-18859,[3] authorizing operations, in interstate or foreign commerce, as a motor common carrier of general commodities, with exceptions,[4] over two regular routes, from Chicago to Hastings, Nebr., one via Davenport, Belle Plaine, and Missouri Valley, Iowa, and Omaha and Lincoln, Nebr., and the other via Peoria, Ill., Burlington, Ottumwa, and Glenwood, Iowa, and Omaha

[2] Wire, wire products, iron and steel fence posts, burial vaults, damaged burial vaults, and livestock.

[3] On February 28, 1946, in No. MC-FC-22598, the transfer of the rights in certificate No. MC-18859, issued June 19, 1944, from Arno N. Harper to Smith was approved.

[4] The exceptions do not include a specific restriction against the transportation of household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467.

and Lincoln, and return with no transportation for compensation except as otherwise authorized, over these routes to Chicago. Service is authorized to and from the intermediate points of Peoria, Rock Island, and Moline, Ill., Davenport,[5] and Council Bluffs, Iowa, and Omaha, Lincoln, and Fairmont, Nebr., and the off-route points of Canton, Ill., Clinton, Iowa, and Beatrice, Nebr.

By order entered April 8, 1948, under section 212(b), and the transfer rules prescribed thereunder, in No. MC-FC 31549, the Commission, division 5, approved a lease of the above-described operating rights of Smith to William G. Ross, as an individual, for a term expiring April 8, 1953. By a subsequent order entered December 16, 1948, in No. MC-FC 28717, the said division authorized the substitution of the partners (Ross and Kornfeind) in lieu of Ross as lessee of the rights under Smith's certificate. On March 26, 1949, while the rights were under lease to the partners, Smith entered into an agreement, hereinafter described, to sell his rights to vendee herein but no application for approval of the transaction was filed at that time. On April 18, 1949, Smith purportedly by virtue of his option to consider the lease canceled upon the failure of the partners to comply with the terms prescribed in the lease agreement, filed a petition to have the lease terminated, and division 5, on August 3, 1949, entered an order in No. MC-FC 28717 reciting that under the terms of the lease agreement Smith had an option to terminate the lease for non-compliance with its conditions, that the conditions had not been complied with by the partners who had discontinued operations, and that Smith had exercised his option; and ordering Smith to resume operations in accordance with the terms of his certificate in No. MC-18859, and to comply with the requirements of sections 215, 216, and 217 of the act within 30 days from the date of that order. A petition for reconsideration and vacation of the order of August 3, 1949, filed by the partners October 17, 1949, was denied by order of January 10, 1950, which recited that the operating rights had reverted to lessor in accord-

[5] Rock Island, Moline, and Davenport, ar herein called the Tri-Cities.

ance with the lease agreement. Upon further consideration, however, the Commission, upon its own motion and by its order of May 23, 1950, reopened the proceeding for formal hearing which has been held. That order did not vacate or set aside the order of August 3, 1949. The Commission, division 5, after hearing in Nos. MC-FC 31549 and MC-FC 38717, in a report dated March 27, 1951, found that the lessee partnership, composed of Ross and Kornfeind was dissolved December 15, 1948; that no operations had since been conducted by the partnership as such; that all operations under the said lease were discontinued in March or April 1949; that no operations were conducted by the partnership, by Kornfeind and any other person associated with him for a period of at least 60 days; that the discontinuance of operations, as aforesaid, resulted in a reversion to C. H. Smith of the operating rights evidenced by the certificate in No. MC-18859; and that the lease approved April 8, 1948, in No. MC-FC 31549 (and concerning which the substitution of the partnership or lessee was approved December 16, 1948, in No. MC-28717) was of no further force and effect. A petition by Kornfeind for reconsideration of the report and order of March 27, 1951, was denied by the Commission November 11, 1951.

After entry of the order of August 3, 1949, Smith complied with insurance and tariff requirements of the act, but he was not equipped to resume operations, and he was unable to secure funds to finance the building of an organization, with employees, equipment, and other facilities necessary to institute operations. He was then and is now employed as a plant superintendent for the Nebraska Fertilizer Company, of Omaha. On November 2, 1949, the instant application was filed in accordance with the above-mentioned agreement of March 26, 1949; and, as previously shown, operations under Smith's rights have been conducted by vendee under temporary authority since March 26, 1950. On the latter date one of the partners (Kornfeind) instituted a proceeding in the United States District Court for the Northern District of Illinois, Eastern Division, to have the court declare null and void the order of division 5 of

August 3, 1949. On May 26, 1952, the District Court entered a judgment dismissing the complaint.

Pursuant to the previously-mentioned agreement of March 26, 1949, vendee agreed to purchase, free of encumbrance, Smith's interstate operating rights for $12,000, of which $5,000 was deposited in escrow for delivery to Smith upon approval of the transaction by this Commission. The balance of $7,000, less the monthly rentals paid under temporary authority, would be paid to Smith upon consummation of the transaction. No fixed charges would be incurred by vendee in financing the transaction, as the entire purchase price would be paid from current funds. As a result of an agreement between counsel for applicants and Bekins, a stipulation was entered of record at the first hearing that vendee would be willing, in the event of approval, to have canceled any authority Smith may have under his certificate to transport household goods.

Vendee's balance sheet as of November 30, 1950, shows assets aggregating $168,642, consisting of: Current assets $76,344, principally cash $42,759, and accounts receivable $25,770; carrier operating property, less depreciation, $91,525; and prepayments $773. Liabilities were: Current liabilities $49,955, principally notes payable $10,000 and accounts payable $37,093; reserves $3,077; capital stock $40,000; and earned surplus $75,610. Its income statement for the first 11 months of 1950 shows net income of $40,734, before provision for income taxes.

No financial data were submitted for Smith, who has performed no motor carrier service since April 8, 1948, when he leased his rights to Ross.

Because of illness, Smith was unable to be present at the first hearing, but he testified at the further hearing. Smith was in the army for more than four years. When he returned from military service in 1945, he informed C. M. Michel, his brother-in-law, of his desire to go into the trucking business. Michel advised Smith to purchase the rights of Arno N. Harper, which he did for $2,500. To establish the business he invested an additional $2,000 of his own funds

and borrowed $12,000 from Michel. All arrangements relating to the purchase from Harper were handled by Michel.

Immediately after the purchase of the rights, Smith commenced motor carrier service, but as he had no trucking experience, Michel helped in the management of the operations during his spare time. As representative of the service performed by Smith, the evidence shows that within a period beginning in April of 1947 and extending through February 12, 1948, on freight originating in Chicago, or received from connecting carriers at that point, Smith transported 987 shipments: 1,096,671 pounds, to Omaha; 40 shipments, 173,456 pounds, to Beatrice; 38 shipments, 80,611 pounds, to Council Bluffs; 34 shipments, 35,585 pounds, to Hastings; 258 shipments, 24,038 pounds, to Lincoln, and 437 shipments, 400,657 pounds, to Omaha, for interlining with connecting carriers, or a total of 1,794 shipments weighing 2,035,018 pounds. Smith transported on the average of from two to three loads of freight a week from Chicago to Omaha, and in some instances, as indicated, direct deliveries were made to points on his routes west of Omaha. When it became apparent that the motor carrier operations could not be conducted profitably without working capital, Michel advised Smith to accept the offer of Ross to lease his operating rights.

At the time the lease to Ross was effected (April 8, 1948), Smith owned two pick-up and delivery trucks and leased from five to eight tractors and a like number of semitrailers. His only other facilities consisted of an office and dock space in Omaha leased at a rental of $100 a month, and terminal space in Chicago. During the period of his operations between February 28, 1946, and April 8, 1948, the total number of his employees varied from six to nine persons. Immediately following the lease to Ross, Smith sold his equipment to other parties.

Clarence Calabria operates a public truck terminal in Omaha for motor carriers operating into and out of that point. He leases dock space to motor carriers and performs a local pick-up and delivery service for carriers desiring that service. Smith leased dock space from him, under an

oral lease, for a period beginning in March of 1947 and ending in November of the same year, when Smith moved his headquarters to South Omaha. During the period of the lease he performed local service for Smith, including the unloading of trailers, the making of local deliveries in Omaha, and the transfer of interline freight. He also handled freight in the same manner for Smith's lessees in 1948, 1949, and 1950. Paul H. Johnson, an owner-operator, performed service for Smith for a period beginning February 28, 1946, and ending April 8, 1948, or the date of the lease to Ross. He worked for Ross between April 8 and December 16, 1948, during which time he leased three tractors and three trailers to Ross and was responsible for transporting four loads of freight a week from Chicago to Omaha with occasional stops at intermediate points, including Davenport. Johnson also worked for Kornfeind, as an owner-operator, but at infrequent intervals.

Robin Weddle was employed by Smith as a driver of a pick-up and delivery truck in Omaha, and he was so employed at the time of the lease to Ross on April 8, 1948. He was employed by Ross, without change in his duties, for a period of from nine months to a year thereafter. Weddle drove a pick-up and delivery truck for Ross and Kornfeind until March 1949. When Kornfeind informed him in March of 1949 that he was "closing up" he sought and obtained employment elsewhere. At the time of the hearing Wayne C. Holford was employed by Kornfeind as a dock manager in Omaha. He unloads trailers in Omaha for Kornfeind and distributes the freight to local patrons and to interline carriers. Holford drove equipment for Smith between Omaha and Chicago in 1947, and for Ross between the same points in 1948. Kornfeind employed him on October 3, 1949, and the employment has been continuous. He distributes an average of one load of freight a day in Omaha for Kornfeind.

William Derr, a public accountant, testified that he was employed by Ross as a bookkeeper in Omaha on March 10,

[6] Calabria, Johnson, Weddle, Holford, and Deer, appeared and testified in response to subpoenas.

1948, and that he was so employed by Ross, or Ross and Kornfeind, or Kornfeind until March 15, 1949. Derr maintained the books and records of the company, including the truck manifest record. The manifest record was present at the hearing. A tabulation made from that manifest shows that for a period beginning on February 10, 1948, and ending on January 22, 1949, a total of 8,514 truckloads of freight, weighing 10,063,883 pounds, were transported over the routes in question under the Smith certificate. Such shipments do not evidence all of the traffic that moved under the Smith rights during the considered period.

On October 3, 1950, applicants filed a motion for issuance of separate subpoenas to Ross and Kornfeind requiring them to produce certain records. Thereafter, on November 17, 1950, separate subpoenas *duces tecum* were issued directing Ross and Kornfeind to appear at the hearing with the records listed in the subpoenas.

Ross testified that the partnership (Ross and Kornfeind) had been dissolved, that the notice of dissolution had been forwarded to the Commission, that the records relating to the business were not in his possession, that he could not obtain them, that he was not presently connected with the business in any manner, and that he is now employed as a sales manager by another motor carrier. While he was operating he lost approximately $30,000, and, in addition, he is responsible for payment of debts amounting to $15,000 incurred in connection with the business. He does not attribute his unsuccessful operations to a lack of available traffic but to his inexperience with respect to the financing of motor carrier operations. Ross had always been engaged in the sales and solicitation end of the business and now realizes that his overhead expense was too great for the amount of freight transported.

Smith was performing active service at the time Ross took over operations under the lease. Ross commenced service with 11 tractors and a like number of semitrailers of which six units were owned by him, and five units had been leased from Carl Weeks of Lincoln. In addition, he

had available five pick-up and delivery trucks, of which three were stationed at Omaha and two at Chicago. Ross took over Smith's terminal space in Omaha and in Chicago, and established terminal facilities in Moline in a terminal operated by a local cartage company. Freight was handled daily from Chicago to the terminal in Moline for distribution in the Tri-Cities by the drayage company. Traffic was advertised for and solicited in Chicago, the Tri-Cities, Lincoln, and Peoria. Ross also originated tonnage in the Tri-Cities for movement to Chicago and other points. In addition, service was performed from Chicago to Omaha, between Omaha and Peoria, and from Chicago to Peoria, as well as to and from other points on the considered routes. During a period of several months Ross transported a load of interline freight each week from Chicago to Beatrice. In many instances Ross made direct deliveries to points on the considered routes west of Omaha. Freight in less-than-truckload lots destined to such points was interlined in Omaha with connecting carriers for movement to destinations. The evidence warrants the conclusion that Ross, as an individual lessee, actively operated under the Smith rights.

Kornfeind appeared at the further hearing with records substantially as described in the subpoena. Applicants, through counsel, assert that the records submitted by Kornfeind were adequate for the purpose expressed in their motion. The freight bills submitted by Kornfeind show that within a period between April 1, 1949, and March 30, 1950, a total of approximately 6,298 separate shipments were transported under the Smith rights. Kornfeind stated that continuous operations had been performed by him, except for the period March 28 to June 8, 1949, when he was endeavoring to effect the filing of proper insurance. Under Kornfeind's operations of freight originating in Chicago, or received from connecting carriers at that point, about 10 shipments moved to Peoria, 50 to the Tri-Cities, and 5 to Clinton, and shipments were also moved from Chicago to other points on the routes and to some extent from said points to Chicago. Truckload shipments were transported

from Chicago to points on the routes west of Omaha, including Lincoln and Beatrice, but less-than-truckload freight destined to such points was transported to Omaha for interlining with connecting carriers. In September of 1949, Kornfeind ceased service at the Tri-Cities, Peoria, Clinton, and at certain other points, because he found it more convenient to limit the service to the transportation of freight from Chicago to Omaha. On the date of the hearing Kornfeind did not own any equipment, but he was trip-leasing 10 tractors and 10 semitrailers a week for his Chicago to Omaha operations. About 85 percent of the freight handled by Kornfeind is received from connecting carriers in Chicago, and the remaining 15 percent is originated at that point. Before Kornfeind limited the service to movements from Chicago to Omaha, eastbound service was performed over the routes. He stopped the eastbound hauling because such movements were not advantageous to him. Kornfeind also testified that he would now be hauling eastbound freight if he were equipped to handle it in a manner satisfactory to him.

The rights of vendee and vendor do not duplicate as to service, but they permit of operations by both carriers over the same segments of highway (1) between Burlington and the junction of Illinois Highway 116 and U. S. Highway 34 over the latter, about 13 miles, and (2) between Chicago and Davenport over U. S. Highway 34, Illinois Highway 92, and U. S. Highway 6, approximately 173 miles. Vendee presently operates between Keokuk and Chicago via Burlington and Kewanee. It also presently operates between Burlington and Chicago via Davenport and Moline, but its authority does not permit it to serve those two intermediate points or Rock Island. As a result of the purchase vendee would extend its regular routes from Chicago to Hastings via Peoria, Burlington, and Ottumwa, and from Davenport to Hastings via Omaha and Lincoln. Such extensions of its regular routes would enable it to perform long-haul service over routes extending from Chicago to Hastings via Peoria, Burlington and Ottumwa, and from other important points not authorized to be served under

its own rights. Vendee's service is limited for the most part to short hauls, and it finds that the cost of its pick-up and delivery service is in excess of the cost of its over-the-road short-haul service. It is confident that the proposed long-haul service from Chicago to Hastings would permit it to lower the cost of its pick-up and delivery service as compared to its over-the-road expense.

Vendee, under the temporary authority, has operated under the rights continuously. As representative of the freight handled under temporary authority, the evidence shows that between March 20 and November 30, 1950, vendee hauled from Chicago to points permitted to be served on the considered routes 2,181 shipments weighing 4,549,585 pounds, of which the major portion moved to the Tri-Cities and Omaha. Shipments weighing 5,000 pounds or more have been hauled from Chicago directly to authorized points. During the aforesaid period, as to authorized points west of Omaha, vendee moved on its own equipment to Beatrice two shipments weighing 49,345 pounds, to Hastings one shipment weighing 24,006 pounds, and to Lincoln 20 shipments weighing 181,649 pounds, but shipments weighing less than 5,000 pounds destined to authorized points west of Omaha have been hauled by vendee from Chicago to Omaha for interlining with connecting carriers for delivery by them. Within the same period vendee received from connecting carriers in Omaha 20 shipments weighing 40,427 pounds for eastbound movements to Chicago and other points. Vendee anticipates that it will be able, within a reasonable time, to provide all points permitted to be served west of Omaha with direct deliveries on both truckload and less-than-truckload freight.

To provide efficient service under temporary authority, vendee has established terminal facilities in Omaha. Such facilities include a fully equipped office with telephone, a storage room for freight, and dock space sufficient to accommodate from four to five units of equipment. A pick-up and delivery service is provided in Omaha and one truck is stationed at the terminal for that purpose. Also one trailer is stationed at Omaha for the prompt handling of freight

destined to Chicago and other points. The business affairs of the terminal are supervised by a terminal manager who, in addition, actively solicits new business. In the event of affirmative findings herein, vendee would expand its terminal facilities in Omaha for adequate handling of an expected increase in the amount of freight offered for movement over the routes. An average of one full load of freight a day is hauled by vendee from Chicago to Omaha. The equipment used in such service leaves Chicago in the afternoon for arrival in Omaha the following morning. The drivers are changed in Burlington. Based on the results obtained from temporary operations, vendee's president is convinced that traffic is available to the extent necessary for profitable operations.

Under the unified rights vendee would operate as many trips a day as required to handle all available freight in an efficient manner and would purchase additional equipment when needed to meet demands of shippers for increased service. Vendee presently maintains terminals in Chicago, Kewanee, and Burlington, as well as in Omaha for the temporary operations, and leases dock space in Ottumwa and Keokuk. It has available 25 tractors, 38 semi-trailers and 9 trucks. Additional traffic could be transported with its present equipment and its 52 employees would be able to handle increased business without difficulty. Vendee is an experienced motor carrier and has been performing successful service for a number of years. A finding is warranted that it has sufficient finances, equipment, and other facilities to conduct the unified operations in an efficient manner. The interests of employees would not be adversely affected by the transaction.

Herman Jungbluth introduced evidence in support of the application at the further hearing. He operates as a sole proprietor in interstate commerce between Norfolk, Nebr., and Omaha, via Beemer and Fremont, Nebr., and also between Norfolk and Fremont via Columbus and North Bend, Nebr., with service to and from all intermediate points, except those between Columbus and Norfolk. In the early part

of 1948, he interchanged traffic with Ross. Under such arrangements he received interline freight daily in Omaha from Ross for movements to points served, and he originated freight at points on his routes for delivery to Ross in Omaha for movement by the latter to destinations, including the Tri-Cities, Chicago, and certain points in Indiana. The interline arrangements were continued with Kornfeind until a dispute arose over the division of the revenues, and as they were not able to reach an understanding, the arrangements were terminated. He is presently interlining freight with vendee in Omaha. Vendee offers him interline traffic from three to four times a week and occasionally shipments weighing as much as 20,000 pounds. The interline traffic is delivered to him in good condition. He finds that vendee provides a prompt service between Chicago and Omaha and that his interchange arrangements with vendee are helpful in the conduct of his transportation business.

All of the interveners, except Bekins, collectively or separately contended at the first hearing that the application should be denied on the grounds (1) that the operating rights proposed to be purchased by vendee have been dormant for some time, (2) that applicants failed to establish any real need for resumption of the discontinued operations, (3) that adequate service is now being provided by existing carriers, including interveners, in the territory authorized to be served under Smith's certificate, (4) that operations of vendee, an efficient carrier, over Smith's routes, particularly between Chicago, on the one hand, and the Tri-Cities and Omaha, on the other, would divert traffic from them to their detriment, and (5) that as their eastbound traffic is, and always has been, lighter than their westbound traffic, competitive operations with vendee between the indicated points would further unbalance their lading and compel them to maintain an increased amount of idle equipment and otherwise impair their investments. The extensive evidence adduced by interveners on the record in support of their contentions is detailed in the prior report and need not be repeated here.

In the prior report, we stated:

> Aside from Michel's unsupported testimony that Smith was in operation, although admittedly on a limited basis, prior to the lease of his rights to Ross, applicants have submitted no evidence as to the nature and scope of any operations conducted under these rights. Part of the burden of proof which applicants must meet in these proceedings is to establish that operations have been conducted by the carriers involved, including some evidence as to the equipment operated, frequency of service, routes traversed, and commodities transported. This is necessary if we are to appraise the effects of a proposed unification of operations even in the normal case where no question is raised as to sporadic or abandonment operations; and it is even more essential that this burden be met in some detail in cases where, as here, that question is present. Applicants have failed to meet that burden of proof.

In their exceptions to the examiner's proposed report on further hearing interveners restate their prior contentions and argue (1) that the evidence adduced warrants the conclusion that the operations under Smith's rights have been so sporadic as to constitute dormancy, or that the service provided under the rights for a prolonged period of time has been so limited that it could not be considered competitive with the service rendered by interveners, and (2) that approval of the transaction would permit vendee to establish new and additional service without a showing of a public need therefor. They stress that their eastbound traffic has always been lighter than westbound, and approval, where service has been limited to a substantial extent to westbound movements, would further unbalance their freight and compel them to return an increased number of empty vehicles to Chicago. Kornfeind excepts to the examiner's conclusion, contending that the instant proceeding should be held in abeyance pending a final determination on the aforesaid court proceeding.

The evidence of record, particularly that adduced at the further hearing, clearly establishes that a substantial and continuous service has been provided under the considered operating rights, with the exception of a short period between March 28 and June 8, 1949, and interveners' contention that the operations have been dormant, or even sporadic as to westbound service, is not supported by the record. Since March 20, 1950, vendee has been performing a substantial service under the rights and there is no evidence upon which to conclude that the services or revenues of competing carriers have been affected to any material degree. We are not convinced that the purchase would have any substantially greater effect, or that the traffic available westbound is not sufficient to support the services of the carriers now operating. The cases cited by interveners involved purchases of rights under which operations had been discontinued or were so sporadic as to amount to little competition, and are not in point on the facts present here, particularly in view of our conclusions hereinafter that the operating authority covers a westbound service only.

The evidence shows clearly that for a number of years eastbound service, especially from Omaha and the Tri-Cities, was performed by Ross, Ross and Kornfeind, Kornfeind, and now vendee, under the Smith rights, although the volume of traffic hauled on eastbound movements has been small as compared with the volume transported westbound. Vendee, under the temporary authority, has performed both westbound and eastbound service, particularly between Omaha and Chicago, because it construes the certificate as authorizing two-way service between all points permitted to be served, except that a return movement may not be performed from Hastings. This seems to have been the interpretation placed upon the certificate by all the carriers operating under these rights. We are unable to agree with this interpretation of the certificate. In our opinion, the certificate is without ambiguity in authorizing one-way service from Chicago westward to Hastings, with service to and from the specified intermediate and off-route points on

westbound traffic only. To illustrate, vendee may originate a shipment in Chicago for delivery in the Tri-Cities and Omaha, and in those points for movement to Lincoln, but it may not originate a shipment at any one of the specified intermediate and off-route points for eastbound service. In other words, beginning in Chicago the certificate permits only the transportation of freight to and from all intermediate and off-route points in a westerly direction toward Hastings. Vendee should promptly take steps to bring its operations in conformity with the service authorized by the certificate. The unified rights would permit vendee to serve the additional intermediate points on its present routes of Davenport, Rock Island, and Moline in one-way movements from Chicago and enable it to perform long-haul service from Chicago to Hastings serving important intermediate and off-route points, including Omaha and Lincoln. Since only westbound service may be performed under the Smith certificate, it will not be necessary to consider further the contention stressed by interveners in their exceptions that operations by vendee would further unbalance their eastbound movements.

Bekins, in its exceptions, appears to be under a misapprehension as to the aforesaid stipulation entered into on the record at the first hearing. Vendee then and now is willing to abide by the stipulation. The record discloses that notice of the further hearing was forwarded to Bekins, but it was not present. While the parties may not, by agreement limit the service authorized by a certificate of public convenience and necessity, without regard to the needs and convenience of the public, we are of the opinion that the operating rights should be restricted against the transportation of household goods because there is no evidence that any such service has ever been rendered under those rights, and the limitation should be imposed in the interest of clarification. Our findings will be conditioned accordingly. The parties may, if they desire, adjust the purchase price downward without our further authority.

In his exceptions Kornfeind argues that the examiner did not fully consider that he is now operating under the rights

and has been operating since the institution of the instant proceeding; that this proceeding is intimately related to the previously-mentioned court proceeding; and that no final determination should be made herein until after final disposition of the court proceeding. Under orders of this Commission which are outstanding, Kornfeind has no authority from this Commission to operate. His legal rights and obligations will doubtless be determined by the court and are not properly for determination herein.

By petition filed October 10, 1951, Smith requested cancelation (1) of his lease agreement with vendee dated October 28, 1949, and (2) of the order of March 6, 1950, as amended by orders of August 14 and October 31, 1950, authorizing vendee to conduct temporary operations. This petition has since been withdrawn and need not be considered.

Vendee would prefer to amortize the amount assigned to its "Other Intangible Property" account as a result of the transaction over a period of five years, but is willing to write it off immediately if we should so require. Considering the credit balance in vendee's surplus account, no undue hardship would result were it required to write off the amount immediately, and our findings will be conditioned accordingly.

On further hearing, we find that purchase by Burlington-Chicago Cartage, Inc., of the operating rights of C. H. Smith, doing business as Chicago-Nebraska Motor Express and the acquisition by R. J. Hurst and D. H. Hurst of control of the operating rights, through the purchase, upon the terms and conditions set forth above and in the prior report, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a) and will be consistent with the public interest, and that, upon consummation of the transaction herein authorized, Burlington-Chicago Cartage, Inc., will be entitled to operate under the operating rights granted C. H. Smith, doing business as Chicago-Nebraska Motor Express in No. MC-18859, as herein modified, which rights

are herein authorized to be unified with rights otherwise confirmed in Burlington-Chicago Cartage, Inc., and to be embraced in a certificate in its name, with duplications eliminated; *provided, however*, that if the transaction is consummated, Burlington-Chicago Cartage, Inc., shall immediately write off the amount assigned to its "Other Intangible Property" account as a result of the instant transaction, such write-off to be accomplished in the manner to be determined upon submission of a statement showing all expenditures and the accounting proposed to record the transaction as required by our order herein; and *provided, further*, that, concurrently with consummation of the transaction, the operating rights purchased shall be modified to exclude authority to transport household goods, as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467.

An appropriate order will be entered.

COMMISSIONER JOHNSON dissents.

APPENDIX B

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 23rd day of June, A.D. 1952.

No. MC-F-1524

R. J. Hurst and D. H. Hurst—Control; Burlington-Chicago Cartage, Inc.—Purchase—C. H. Smith

Further investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report on further hearing containing its findings of fact and conclusions thereon, which report, and the prior report of August 14, 1950, are hereby made a part hereof:

It is ordered, That the order entered herein August 14, 1950, to the extent it denied the application under section 5 of the Interstate Commerce Act, be, and it is hereby vacated, and set aside.

It is further ordered, That purchase by Burlington-Chicago Cartage, Inc., of Kewanee, Ill., of the operating rights of C. H. Smith, doing business as Chicago-Nebraska Motor Express, of Omaha, Nebr., and acquisition of control of the operating rights by R. J. Hurst and D. H. Hurst, both of Kewanee, through the purchase, be, and they are hereby, approved and authorized, subject to the terms and conditions set out in the findings in said report on further hearing.

It is further ordered, That, if the parties to the transaction herein authorized desire to consummate same, they shall (1) promptly take such steps as will insure compliance with sections 215 and 217 of the Interstate Commerce Act, and with rules, regulations, and requirements prescribed thereunder, and (2) confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place.

It is further ordered, That the authority herein granted shall not be exercised prior to the effective date hereof, and that their order shall be effective on August 1, 1952.

It is further ordered, That, unless the authority herein granted is exercised within 60 days from the effective date hereof, this order shall be of no further force and effect.

It is further ordered, That effective with consummation of the transaction herein authorized, or 60 days from the effective date hereof, whichever first occurs, the temporary authority granted by order of March 6, 1950, as extended by the orders of August 14 and October 31, 1950, shall be of no further force and effect.

It is further ordered, That, recital in said report of balance sheet and other financial data shall not be construed as approving accounting methods which have been followed or expenditures represented thereby.

And it is further ordered, That, if the authority herein granted is exercised, Burlington-Chicago Cartage, Inc., shall submit for consideration and approval a sworn statement and two copies thereof, showing all expenditures made, by dates, or to be made in connection with the transaction authorized, including the consideration, legal and other fees, commissions, witness fees, and any other cost incidental to the transaction, the assets acquired, and the liabilities assumed, indicating the account number and title to which each item has been, or is to be, debited or credited.

By the Commission, division 4.

W. P. BARTEL,
Secretary.

(SEAL)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION

Burlington-Chicago Cartage, Inc., Plaintiff; vs. United States of America, Defendant, and Interstate Commerce Commission, Intervening Defendant.	No. P-2240

Before CASTLE, Circuit Judge, MERCER and POOS, District Judges.

MERCER, District Judge. By its complaint against the United States of America, plaintiff seeks to review several orders of the Interstate Commerce Commission and prays that such orders be vacated and set aside. By order entered

July 27, 1959, the Interstate Commerce Commission was joined as an intervening defendant.

Defendants, by their joint answer, averred, that the complaint fails to state a cause of action, basing that position principally upon the decision in Callanan Road Co. v. United States, 345 U. S. 507. Further answering, in the alternative, defendants admit essentially all facts stated in the complaint but deny that the Commission acted unlawfully or arbitrarily in entering the orders of which complaint is made.

Plaintiff is a common carrier of freight over certain certificated routes in the States of Illinois, Indiana, Iowa and Nebraska. On or about November 2, 1949, plaintiff and one C. H. Smith, doing business as Chicago-Nebraska Motor Express, filed a joint application with the Commission seeking authority for the purchase by plaintiff of certain operating rights previously granted to Smith for haulage of general commodities over regular routes from Chicago, Illinois, to Hastings, Nebraska, and "to and from" certain specified intermediate and off-route points. While the purchase-authorization proceeding was pending before the Commission, plaintiff, on or about March 30, 1950, began operating under the Smith rights as lessor thereof pursuant to a temporary authorization granted by the Commission. On August 14, 1950, the Commission denied the purchase authorization application. After a further hearing was had upon the application, the Commission reversed itself and issued its report and order dated June 23, 1952 authorizing plaintiff to make the purchase. In its report, the Commission interpreted the "Smith rights" grant as authorizing only west-bound movements of freight for compensation. In this context, the Commission found that Smith, and plaintiff as lessee under temporary authorization, and all other lessees who had operated under the certificate had exceeded the authority granted to Smith by performing movements for compensation east-bound from intermediate and off-route points. It directed that such unauthorized service be discontinued.

Precisely when plaintiff purchased the Smith operating rights under authority of the June 23, 1952 order does not appear from the pleadings. Plaintiff did purchase those rights and it is a fair assumption that the purchase was effected between June 23, 1952 and August 11, 1952. On the latter date plaintiff petitioned for reconsideration of the June 23d decision, requesting that the rights, with respect to intermediate and off-route points, be interpreted to permit both west-bound and east-bound transportation for compensation. On January 5, 1953, the Commission denied the latter petition, without opinion. Thereafter, on September 23, 1953, the Commission issued to plaintiff a consolidated certificate of public convenience and necessity which included both the purchased Smith rights and operating rights previously granted to plaintiff. The language of the consolidated certificate which delineates the operating rights acquired through the purchase from Smith, was revised to indicate with greater specificity than the original certificate to Smith had done that only west-bound transportation for compensation was permitted as to all points which plaintiff was thereby permitted to serve.

Thereafter, the cause lay dormant until April 11, 1958, when plaintiff filed with the Commission its Petition for Clarification and or Interpretation and Declaratory Order requesting the Commission to interpret the consolidated certificate to permit both west-bound and east-bound traffic with respect to plaintiff's operation between the "Smith rights" intermediate and off-route points. An order was entered on July 29, 1958 denying plaintiff's petition on the ground that the certificate had been previously interpreted by the whole Commission and that no need or justification was shown for further interpretation or clarification thereof. Plaintiff then filed a petition on August 23, 1958 for reconsideration of its April 11th petition. The last-gasp effort before the Commission was denied by order entered December 10, 1958 as a repetitious petition for rehearing violative of Commission rules.

Plaintiff then filed its complaint in this Court on May 26, 1959, for review of the several orders and reports of the

Commission construing its "Smith rights" grant as permitting only west-bound transportation for compensation. Plaintiff alleges that such interpretation of the Smith certificate, and the "Smith rights" portion of the plaintiff's consolidated certificate, is unlawful, arbitrary, capricious and not justified by the evidence before the Commission prior to its June 23, 1952 report and order.

At the outset, we are faced with defendants' first defense, namely, that the complaint fails to state a cause of action upon which relief can be granted. After due consideration we are of the opinion that the decision in Callanan Road Co. v. United States, 345 U. S. 507, is not in point, factually. The decision in Callanan rests upon the particular fact situation there presented. One Hutton had been granted a "grandfather clause" certificate of convenience and necessity as a common carrier by water between ports of call in designated areas. Thereafter, on its own motion, the Commission issued to Hutton an amended certificate restricting his operating rights to freightage service only and excluding contract towage service. Hutton accepted the amended certificate without protest and continued operating thereunder until his death. After Hutton's death, Callanan purchased his operating rights by Commission authorization granted in 1947. Several years thereafter Callanan filed a petition requesting an interpretation of its "Hutton rights" certificate permitting it to engage in towage service. The cause reached the Supreme Court in proceedings instituted by Callanan to review an order of the Commission interpreting the "Hutton rights" certificate as permitting freightage service only. Upon this factual background, the Supreme Court held that the proceeding instituted by Callanan could not be maintained for the reason that it constituted a collateral attack upon the Commission order under which Hutton's certificate had been amended prior to the time of Callanan's purchase of the Hutton operating rights. The Court held further that Callanan having invoked the power of the Commission for approval of the transfer of the Hutton certificate, as amended, was estopped to deny the authority of the Commission to issue that certificate.

In the instant cause there is no collateral attack and no similar factual basis for an estoppel. Plaintiff sought approval for the purchase of the certificate as originally granted to Smith. Amendment of the language of the certificate intervened in the case after the interpretive report issued by the Commission on June 23, 1952. Subsequent proceedings, including this cause, have been directed to review of that report and orders issued thereon. This is therefore a direct attack upon the Commission orders and not subject to the infirmities found to exist in the Callanan case.

In conjunction with their attack upon the complaint, defendants assert that plaintiff seeks to vacate a part only of the Commission's interpretive report and order. Thus, defendants state that plaintiff seeks to retain the fruits of the order in the form of the authorization for purchase of the Smith certificate, while, in the same breath, attacking that part of the report and order which interprets that certificate to permit compensated transportation west-bound only. In conjunction with this argument, defendants also assert laches as inimical to the interests of other carriers.

Neither assertion has either logical appeal or supporting precedent requiring its adoption. Federal Power Co. v. Idaho Power Co., 344 U. S. 17, upon which defendants rely decided only that the courts, upon reversal of an administrative order, may not usurp the administrative function and rewrite the order—that the cause must be remanded to the administrative body for further proceedings consistent with the Court's decision. Since the result of vacation of the orders in issue would be a remandment to the Commission, the interest of the Commission in maintaining its control over interstate commercial motor carriage and the interests of competing carriers would be protected should the orders be vacated.

Defendants' first defense is overruled.

The merits of the cause consist solely of the question of interpretation of the single phrase "to and from," as that phrase is used in the Smith certificate. Smith was granted

a certificate of convenience and necessity for the transporting of freight by motor vehicle, as follows:

"*General commodities*, except those of unusual value and, except dangerous and explosives, livestock, commodities in bulk, commodities requiring special equipment other than refrigeration, and those injurious or contaminating to other lading, over regular routes,

"From Chicago, Ill., to Hastings, Nebr., as follows:

"From Chicago over U. S. Highway 34 to Lamoille, Ill., thence over Illinois Highway 92 via Silvis, Ill., to Moline, Ill., thence over U. S. Highway 6 to Marengo, Iowa, thence over Iowa Highway 212 via Belle Plaine, Iowa, to junction U. S. Highway 30, thence over U. S. Highway to Missouri Valley, Iowa, thence over Alternate U. S. Highway 30 to Council Bluffs, Iowa, and thence over U. S. Highway 6 to Hastings;

"From Chicago over U. S. Highway 66 to Chenoa, Ill., thence over U. S. Highway 24 to Peoria, Ill., thence over Illinois Highway 116 to junction U. S. Highway 34, thence over U. S. Highway 34 to Glenwood, Iowa, thence over U. S. Highway 275 to Council Bluffs, Iowa, thence over U. S. Highway 6 to Hastings (also from Glenwood over U. S. Highway 34 to Lincoln, Nebr., thence over U. S. Highway 6 to Hastings); and

"*Return, with no transportation for compensation except as otherwise authorized, over these routes to Chicago.*

"Service is authorized to and from the intermediate points of Peoria, Rock Island and Moline, Ill., Davenport and Council Bluffs, Iowa and Omaha, Lincoln and Fairmont, Nebraska, and the off-route points of Canton, Ill., Clinton, Iowa, and Beatrice, Nebr." (Emphasis supplied.)

In its report authorizing plaintiff's purchase of the Smith operating rights the Commission interpreted the emphasized paragraph of the certificate as follows:

> "Vendee, under the temporary authority (for operation under the Smith rights), has performed both west-bound and east-bound service, particularly between Omaha and Chicago, because it construes the certificate as authorizing two-way service between all points permitted to be served, except that a return movement may not be performed from Hastings. This seems to have been the interpretation placed upon the certificate by all of the carriers operating under these rights. We are unable to agree with this interpretation of the certificate. In our opinion, the certificate is without ambiguity in authorizing one-way service from Chicago westward to Hastings, with service to and from the specified intermediate and off-route points on west-bound traffic only." 58 M.C.C. at 477.

Further spelling out its interpretation of "to and from" the Commission added that the certificate authorized origination of a shipment at one point for a west-bound intermediate destination, and the origination at such destination of shipments to be moved westward along the route. See to same effect, Washington Express, Inc. — Interpretation of Certificate, 63 M.C.C. 537, 544.

Plaintiff concedes that it could not perform east-bound movements for compensation from Hastings under the original Smith certificate, but it argues that the west-bound only restriction cannot be construed to prohibit east-bound movements for compensation from the intermediate points and off-route points permitted to be served. As we understand it, plaintiff's argument is as follows: The text of the certificate after spelling out the route permitted to be used from Chicago to Hastings, then specifies that no return trip "transportation for compensation" may be performed "except as otherwise authorized"; permitted service "to and

from" specified intermediate and off route points is delineated in the portion of the certificate which follows the proscription of "return, with no service for compensation," which must be read as an exception to that proscription; that "to and from," as to all intermediate and off-route points, must, therefore, be interpreted to authorize transportation in both directions along the prescribed routes; and that the Commission acted arbitrarily and unlawfully in concluding that the restriction against the "east-bound" movements for compensation applied to all points along the route.

It appears that the Commission has recognized that plaintiff's argument wears the mantle of merit to the extent that the appeal of the argument rests upon the contention that the Smith certificate was ambiguous. Thus, despite the Commission's opinion that that certificate was "without ambiguity," when the same rights were spelled out in plaintiff's consolidated certificate the composition of the text was revised to show clearly that the restrictive clause referred to all points along the route, to wit:

> "*General commodities*, except those of unusual value, Class A and B explosives, livestock, household goods as defined by the Commission, commodities in bulk, commodities requiring special equipment other than refrigeration, and those injurious or contaminating to other lading.
>
> "From Chicago, Ill., to Hastings, Nebr., with service to and from the intermediate points of Peoria, Rock Island, and Moline, Ill., Davenport and Council Bluffs, Iowa, and Omaha, Lincoln and Fairmont, Nebr., and the off-route points of Canton, Ill., Clinton, Iowa, and Beatrice, Nebr., as follows:
>
> "From Chicago over U. S. Highway 34 to Lamoille, Ill., thence over Illinois Highway 92 via Silvis, Ill., to Moline, Ill., thence over U. S. Highway 6 to Marengo, Iowa, thence over Iowa Highway 212 via Belle Plaine, Iowa, to junction U. S. Highway 30,

thence over U. S. Highway 30 to Missouri Valley, Iowa, thence over Alternate U. S. Highway 30 to Council Bluffs, Iowa, and thence over U. S. Highway 6 to Hastings.

"From Chicago over U. S. Highway 66 to junction Alternate Highway 66, thence over Alternate Highway 66 to junction U. S. Highway 66, thence over U. S. Highway 66 to Chenoa, Ill., thence over U. S. Highway 24 to Peoria, Ill., thence over Illinois Highway 116 to junction U. S. Highway 34, thence over U. S. Highway 34 to Glenwood, Iowa, thence over U. S. Highway 275 to Council Bluffs, Iowa, thence over U. S. Highway 6 to Hastings (also from Glenwood over U. S. Highway 34 to Lincoln, Nebr., thence over U. S. Highway 6 to Hastings).

"Return, with no transportation for compensation except as otherwise authorized, over these routes to Chicago."

If we are to vacate the Commission's report and orders, however, that decision must be based upon something more substantial than preference in semantics and composition. Though we may believe that a more aptly expressive term than "to and from" might have been employed to signify a restriction of compensated transportation to one-way movements only, we cannot interfere with the Commission's interpretation unless we can say that it is without "rational basis," (Mississippi Barge Lines v. United States, 292 U. S. 282, 286-287) and clearly erroneous. One of the more recent statements by the Supreme Court of that principle appears in Nelson v. United States, 355 U. S. 554, 558-559, in pertinent part as follows:

"In ascertaining (the meaning of words used in operating authority issued by the Commission), we are not given *carte blanche*; just as the precise delineation of an enterprise which seeks the protection of the "grandfather" clause has been reserved for the Commission, Noble v. United States, 319 U. S. 88,

93 (1943), subsequent construction of the grandfather permit by the Commission is controlling on the courts unless clearly erroneous. *Dart Transit Co. v. Interstate Commerce Comm'n*, 110 F. Supp. 876, aff'd 345 U. S. 980 (1953)."

In Malone Freight Lines, Inc., v. United States, 107 F. Supp. 946, 949, aff'd 344 U. S. 925, the Court aptly stated that "the scope of our review is necessarily confined to the interpretation placed by the Commission upon a certificate of its creation." We are bound by that interpretation unless we are persuaded that it was capricious or arbitrary, that it constituted an abuse of discretion, or that it did violence to some established principle of law. See to same effect Dart Transit Co. v. Interstate Commerce Commission, 110 F. Supp. 876, 880, aff'd 345 U. S. 980; Adirondack Transit Lines v. U. S., 59 F. Supp. 503, 504, aff'd 324 U. S. 824.

We cannot say that the Commission's interpretation of the rights granted by the Smith certificate is either arbitrary, or capricious, or clearly erroneous. Considered in the light most favorable to plaintiff's cause, the very strongest case to be put is that the text of the Smith certificate is ambiguous. "So regarding it, its interpretation is for the Commission's" and this Court cannot overrule and set aside the Commission's interpretation "unless it is clearly erroneous or arbitrary, and the interpretation here is not." Adirondack Transit Lines, Inc. v. United States, 59 F. Supp. 503, 504, aff'd 324 U. S. 824.

It is significant, also in support of the challenged orders that plaintiff purchased the Smith rights with notice of the restrictive interpretation of which it now complains. The same report which authorized plaintiff to consummate the purchase spelled out the one-way compensated traffic limitation. We think plaintiff cannot now plead with any strength of conviction that it received less than it bargained for at that time. See Callanan Road Co. v. United States, 345 U. S. 507, 513.

For the foregoing reasons the complaint is dismissed.

ENTERED this 27th day of November, 1959.

s/ Latham Castle
Circuit Judge

s/ Frederick O. Mercer
District Judge

s/ Omer Poos
District Judge

APPENDIX D

ORDER DISMISSING COMPLAINT

The Clerk's Docket Entry for November 30, 1959, shows as follows:

"Complaint is dismissed by ord. of Judge Frederick O. Mercer, Lathan Castle, Circuit Judge & Omer Poos, Judge, Ent.

(Mercer, J.)

(Castle, J.)

(Poos, J.)"

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 23 1960
JAMES R. BROWNING, Clerk

No. 726

In the Supreme Court of the United States

OCTOBER TERM, 1959

BURLINGTON-CHICAGO CARTAGE, INC., APPELLANT

v.

UNITED STATES OF AMERICA AN
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
ROBERT A. BICKS,
Acting Assistant Attorney General,
Department of Justice, Washington 25, D.C.
ROBERT W. GINNANE,
General Counsel,
CARROLL T. PRINCE, Jr.,
Assistant General Counsel,
Interstate Commerce Commission, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 726

BURLINGTON-CHICAGO CARTAGE, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(e), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on November 30, 1959, by a three-judge district court convened under 28 U.S.C. 2284 and 2325, dismissing the appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. As here relevant, the Commission's report and order (J. St. 13–32) interprets the operating authority con-

ferred by a certificate of public convenience and necessity acquired by the appellant.

The appellant applied in 1949 for authority, as required by Section 5 of the Interstate Commerce Act (49 U.S.C. 5), to acquire, by purchase, the operating rights of Chicago-Nebraska Motor Express. In reversing a prior determination, the Commission approved the appellant's application to purchase the other carrier's operating authority. *Burlington-Chicago Cartage, Inc.—Purchase—Smith*, 58 M.C.C. 465 (1952). In this report the Commission set forth its interpretation of the now disputed portion of the certificate then held by the appellant's vendor, which, as here pertinent, reads as follows (J. St. 4-5):

> *General Commodities* * * *
>
> From Chicago, Ill., to Hastings, Nebr. * * *
>
> Return, with no transportation for compensation except as otherwise authorized, over these routes to Chicago.
>
> Service is authorized to and from the intermediate points of Peoria, Rock Island, and Moline, Ill., Davenport and Council Bluffs, Iowa, and Omaha, Lincoln, and Fairmont, Nebr., and the off-route points of Canton, Ill., Clinton, Iowa, and Beatrice, Nebr.

The Commission determined (J. St. 29-30) that the foregoing operating authority allows "one-way service from Chicago westward to Hastings, with service to and from the specified intermediate and off-route points on westbound traffic only." Thus, transportation is authorized of a shipment originating or terminating at Peoria, Illinois, but only in connection with westward

movements, and no east-bound movements are permitted." The appellant's petition for reconsideration of this determination was denied by the Commission on January 5, 1953 (J. St. 36). Following consummation of the Commission-approved purchase, a certificate reflecting the newly acquired rights was issued to the appellant on September 23, 1953 (*ibid.*). The language setting forth the operating rights acquired through the purchase "was revised to indicate with greater specificity than the original certificate * * * that only west-bound transportation for compensation was permitted as to all points" which the appellant was permitted to serve (*ibid.*).

In April, 1958, some five years later, the appellant petitioned the Commission to find that the operating authority under consideration authorizes both east-bound and west-bound service to and from the off-route and intermediate points. The Commission, relying on its earlier interpretation, denied the petition, and denied a petition for reconsideration (J. St. 36). There followed the present suit, in which the three-judge district court unanimously held that no ground had been shown for setting aside the Commission orders which give effect to its interpretation of the appellant's certificate.

ARGUMENT

As this Court stated in *Nelson* v. *United States*, 355 U.S. 554, 558, the courts "are not given *carte blanche*" in ascertaining the meaning of the words used in a certificate of operating authority issued by the Commission; and the Commission's construction "is con-

trolling on the courts unless clearly erroneous." In the present case the court below stated that the Commission's interpretation of the rights here involved cannot be said to be "arbitrary, or capricious, or clearly erroneous" (J. St. 43). The basic grant was of one-way operating authority, "from" Chicago "to" Hastings. Authorization of service to and from intermediate and off-route points was subsidiary to this basic grant, and permitted service to and from intermediate points in the course of proviiding westward transportation. At the very least, the interpretation thus adopted by the Commission is reasonable. The court below noted that the strongest possible case to be put for the appellant is that the text of its certificate is ambiguous, but the court properly noted that mere ambiguity is not ground for overruling the Commission's interpretation (J. St. 43).

We submit that the appellant's reliance (J. St. 8–9) upon the italicized words in the sentence, "Return, with no transportation for compensation *except as otherwise authorized*, over these routes to Chicago," is misplaced. The italicized exception is a standard phrase used in certificates granting one-way authority. The reason for reference to the return movement is that authority is required for empty movements of motor vehicles in connection with interstate service as a common carrier.[1] A further reason for such exception is to avoid possible conflict with

---

[1] *Wasie Common Carrier Application*, 4 M.C.C. 726, 729; *O.K. Motor Service, Inc., Common Carrier Application*, 30 M.C.C. 95, 99; *United Truck Lines, Inc., Transfer of Empty Equipment*, 32 M.C.C. 676, 678.

other grants of authority to the certificate holder. Thus, the certificate which the appellant holds contains the following grant (see Exhibit A (p. 2) attached to its complaint):

> *Wire, wire products,* and *iron and steel fence posts,*
> From Peoria, Ill., to Burlington, Iowa, with no transportation for compensation on return except as otherwise authorized.

Aside from the foregoing, the appellant appears to be barred from attacking the certificate because it invoked the authority of the Commission to obtain the certificate, which it accepted pursuant to Commission authorization knowing that the Commission interpreted the certificate as authorizing only westward movements. See *Callanan Road Co. v. United States*, 345 U.S. 507. The appellant therefore "accepted the transfer with the limitations contained in the certificate" and "now will not be heard to say it is entitled to receive more than its transferor had." 345 U.S. at 513. We submit that *Callanan* is not distinguishable, as the court below thought (J. St. 37-38), upon the ground that here, but not in *Callanan*, the vendee, at the time it sought authority to purchase, requested the Commission to give the certificate the interpretation which appellant now asserts. Its acceptance of the certificate, without seeking judicial review of the Commission's ruling, would appear to estop it from attacking that ruling in a proceeding instituted some five years later.

CONCLUSION

For the foregoing reasons, the decision below is correct and should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
ROBERT A. BICKS,
Acting Assistant Attorney General.

ROBERT W. GINNANE,
General Counsel,

CARROLL T. PRINCE, JR.,
Assistant General Counsel,
Interstate Commerce Commission.

MARCH 1960.

U.S. GOVERNMENT PRINTING OFFICE 1960

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FILED
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 726

BURLINGTON-CHICAGO CARTAGE, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA,
and
INTERSTATE COMMERCE COMMISSION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

REPLY TO MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

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No. 726

BURLINGTON-CHICAGO CARTAGE, INC.,
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vs.

UNITED STATES OF AMERICA,
and
INTERSTATE COMMERCE COMMISSION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

REPLY TO MOTION TO AFFIRM

STATEMENT

This action was commenced in the district court to set aside an order of the Interstate Commerce Commission deciding that although the certificate of authority pur-

chased by appellant from another carrier, with the Commission's approval, gave the right to perform for-hire operations "to and from" certain specified points, such movements are to be restricted to westbound traffic only. The three-judge statutory court entered a final judgment dismissing the complaint and this is a direct appeal therefrom.

Pursuant to Rule 16, paragraph 1(e), of the Rules of this Court, appellees have moved to affirm the judgment of the district court.

At pages 1-3 of their motion appellees describe the nature of the controversy. No criticism is offered with respect to appellant's statement thereof, as found at pages 4-7 of its Jurisdictional Statement. Actually, throughout the controversy there has been no disagreement among the parties as to the facts. In this same connection it also should be pointed out that the district court's opinion (J. St. 34 *et seq.*) properly states the facts.

ARGUMENT

In support of its motion appellees advance the following propositions: (1) The Commission's construction of the meaning of words in a certificate of operating authority must stand "unless clearly erroneous." (2) The construction of the words involved here is not clearly erroneous. (3) In any event, appellee, by virtue of having consummated the purchase transaction following the Commission's decision as to the westbound restriction in controversy, is estopped from complaining. These points will be discussed in the order named.

The Power of the Courts

Appellant does not controvert the claims made by appellees in their motion (pages 2-3) that, as a general proposition, the Commission's construction of the meaning of words in operating certificates is controlling "unless clearly erroneous." The reason for the rule lies in the supposed expertise of the Commission in the premises. On the other hand, it is submitted by appellant that where, as in the instant case, the Commission undertakes to construe such common everyday words as are involved here, no "expert" knowledge is involved; and, if the interpretation of the Commission is in derogation of the commonly understood meaning of such words, the Commission's action should not be afforded any special sanctity.

The Commission's Interpretation Is Not Reasonable

At pages 4-5 of their motion appellees say the Commission's interpretation of the rights involved here is reasonable and not clearly erroneous.

For ready reference the portion of the operating rights purchased by appellant here in dispute is set out below (J. St. 4-5):

> "General Commodities * * *, over regular routes, From Chicago, Ill., to Hastings, Nebr., as follows:
>
> * * *
>
> Return, with no transportation for compensation *except its otherwise authorized* over these routes to Chicago.
>
> Service *is* authorized *to and from* the intermediate points of Peoria, Rock Island, and Moline, Ill., Davenport and Council Bluffs, Iowa and Omaha, Lincoln,

and Fairmont, Nebr., and the off route points of Canton, Ill., Clinton, Iowa, and Beatrice, Nebr." (Emphasis added.)

The Commission construed the above quoted phrase "to and from" to mean with respect "to westbound traffic only." (J. St. 2930) In other words, the Commission decided that the phrase "to and from" means the same thing as if *only* the word "to" appeared. Or, to look at it a different way, the interpretation placed upon the certificate by the Commission is as if the certificate read "Service is authorized *westward* to and from the intermediate points * * * and off-route points * * *." In order to reach a rational conclusion that only a one-way movement in connection with the disputed points was accorded by the certificate, the Commission necessarily either had to eliminate from the certificate the words "and from" or add to it the word "westward." The Commission lacks the power to do either. Its interpretation clearly is erroneous.

In further support of its claim that the Commission's interpretation has no foundation, appellant, at pages 8-9 of its Jurisdictional Statement, emphasized by the use of italics the phrase "except as otherwise authorized," as found in the certificate. In its motion (p. 4), appellees say such reliance is misplaced. The point made by appellant is this: The certificate which appellant purchased provides for one-way transportation of general commodities "From Chicago, Ill., to Hastings, Nebr."[1] It then says, "Return, with no transportation for compensation, *except otherwise provided*, over these routes to Chicago." Immediately following these words the certificate says: "Service *is* authorized to and from" the intermediate and off-route points set out in the instrument. Thus, construed in proper context, the certificate clearly indicates, by the use of the phrase "except as

[1] About which there is no controversy.

otherwise authorized," that while there is to be no return eastwardly for compensation from Hastings, Nebraska, to Chicago, nevertheless an exception is to be carved out. That exception is then created in the very next sentence: "Service authorized *to and from*" the described intermediate and off route points.

It is claimed by appellees that appellant's reliance upon the italicized words in the sentence, "Return, with no transportation for compensation *except as otherwise authorized*, over these routes to Chicago," is "misplaced" for this reason: Appellee's claim (motion, p. 4) that since the certificate provides only a one way grant of authority from Chicago to Hastings, the reason for the reference to a return movement is to enable appellant to get its empty vehicles back to Chicago after deliveries to Hastings, Nebraska. It is said by appellees that Commission authority is required for the movement of empty vehicle equipment over the highways. Appellees cite three Commission decisions in a footnote (p. 4) in support of the proposition.

An examination of these decisions, however, shows they are not in point here. All of them disclose that Commission authority to move empty vehicle equipment was being sought between points which the applicant carriers *had not been certificated to serve*. None of these cases involved the question of whether a carrier, having been authorized to perform a one way movement, could return its empty equipment to the point of origin as a matter of right.

Appellant knows of no decision holding that a carrier must have authority to return its empty vehicle equipment to the point of origin.

Furthermore, the Commission's own Rules are at odds with the position appellees are taking in their motion. Under the so-called Deviation Rules of the Commission it

is declared that a carrier may, as a matter of right, deadhead its empty vehicles over the highways between any two points incidental to either a prior or subsequent transportation in interstate commerce.[2] In the case at bar it is inconceivable that the Commission rightly could take the position that, having authorized appellant to make for-hire movements from Chicago to Hastings, appellant nevertheless could not return its empty vehicles from Hastings to Chicago without obtaining additional authority.

Especially since the disputed words in the certificate are non-technical, the interpretation placed upon the certificate by men in the industry is entitled to serious consideration. The decision of the Commission shows on its face (J. St. 29-30) that "for a number of years *eastbound* service" from the intermediate and off-route points had been performed under the certificate by the lessees of the original holder, Smith (who sold to appellant); that, likewise, under temporary authority, appellant performed such eastbound movements; that "all the carriers operating under these rights" have construed the certificate *as authorizing two-way service between all points permitted to be served*, except that a return movement may not be performed from Hastings; and that even the *opposition carriers* who were opposing appellant's application were of the opinion that *eastbound* movements were authorized by the certificate. (Quotation in italics ours)

Applicant submits there is nothing ambiguous about the

[2] The text of the rule is as follows:

"(9) *Deadheading empty vehicles.* A motor carrier may deadhead empty vehicles over any highway use of which is necessary or desirable to accomplish a reasonably direct and practicable movement thereof between any two points incidental to either prior or subsequent transportation in interstate or foreign commerce subject to the Interstate Commerce Act." Code of Fed. Regulations, Title 49 Transportation Part 211 Scope of Operating Authority; Routes, Sec. 211.1(9); Fed Carriers Reports, par. 3578)

certificate, and that the Commission's decision is arbitrary and plainly erroneous.

There is no Estoppel

Lastly, it is asserted by appellees (motion, p. 5) that appellant is estopped from attacking the Commission's decision, even if it is erroneous. According to appellees, appellant is barred because it invoked the authority of the Commission to gain approval of the purchase transaction, and then later accepted the certificate knowing the Commission interpreted it as authorizing only westbound movements. In support appellees cite *Callanan Road Co. v. United States*, 345 U. S. 507, and then go on to say:

> "The appellant therefore 'accepted the transfer with the limitations contained in the certificate' and 'now will not be heard to say it is entitled to receive more than its transferor had.' 345 U. S. at 513."

In the next sentence appellees maintain that the *Callanan* Case is not distinguishable from the case at bar, and that the district court was wrong in holding otherwise. As the district court pointed out in its opinion herein, in the *Callanan* Case the facts show an attempted collateral attack, but in the present case a *direct* attack is made. The district court gave careful consideration to the question. It said (J. St. 37-38):

> "At the outset, we are faced with defendants' first defense, namely, that the complaint fails to state a cause of action upon which relief can be granted. After due consideration we are of opinion that the decision in Callanan Road Co. v. United States, 345 U. S. 507, is not in point, factually. The decision in Callanan rests upon the particular fact situation there presented. One Hutton had been granted a 'grandfather clause' certificate of convenience and necessity as a common carrier by water between ports of call in designated areas. Thereafter, on its

own motion, the Commission issued to Hutton an amended certificate restricting his operating rights to freightage service only and excluding contract towage service. Hutton accepted the amended certificate without protest and continued operating thereunder until his death. After Hutton's death, Callanan purchased his operating rights by Commission authorization granted in 1947. Several years thereafter Callanan filed a petition requesting an interpretation of its 'Hutton rights' certificate permitting it to engage in towage service. The cause reached the Supreme Court in proceedings instituted by Callanan to review an order of the Commission interpreting the 'Hutton rights' certificate as permitting freightage service only. Upon this factual background, the Supreme Court held that the proceeding instituted by Callanan could not be maintained for the reason that it constituted a collateral attack upon the Commission order under which Hutton's certificate had been amended prior to the time of Callanan's purchase of the Hutton operating rights. The Court held further that Callanan having invoked the power of the Commission for approval of the transfer of the Hutton certificate, as amended, was estopped to deny the authority of the Commission to issue that certificate.

"In the instant cause there is no collateral attack and no similar factual basis for an estoppel. Plaintiff sought approval for the purchase of the certificate as originally granted to Smith. Amendment of the language of the certificate intervened in the case after the interpretive report issued by the Commission on June 23, 1952. Subsequent proceedings, including this cause, have been directed to review of that report and orders issued thereon. This is therefore a direct attack upon the Commission orders and not subject to the infirmities found to exist in the Callanan case."

The point which appellees seek to make (motion, p. 5), namely, that having accepted the certificate knowing of

the construction placed upon it by the Commission, appellant "now will not be heard to say it is entitled to more than its transferor had" (quoting from the *Callaghan* Decision), not only is factually inapplicable but it also helps to point up the distinctions between the present case and the *Callaghan* Decision. In the case at bar it is perfectly clear that appellant is *not* seeking to gain anything more than its transferor had. All appellant is trying to do is to get exactly what its transferor had and *nothing* more. The Commission concedes that all the carriers who were interested in the authority—vendor and his lessees, applicant and even the opposition carriers—believed the certificate permitted a two-way operation with respect to the subject intermediate and off-route points. Therefore when applicant and its vendor made the purchase contract, both sides considered that these two-way rights constituted part of the consideration to be paid for the certificate—part of the bargain. It logically follows that as things stand now appellant has received less, not more, than it bargained for. To rectify this wrong, appellant has pursued the only course open to it, short of abandoning the contract after the Commission's decision approving the purchase was handed down. Applicant sees no basis for estoppel on this record.

CONCLUSION

For the reasons hereinabove stated, applicant respectfully urges that appellees' motion to affirm should be overruled.

Respectfully submitted,

John E. Lesow
James E. Lesh
3737 N. Meridian Street
Indianapolis 8, Indiana
Attorneys for Appellant

April 1960

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 726

BURLINGTON-CHICAGO CARTAGE, INC.,
Appellant,

vs.

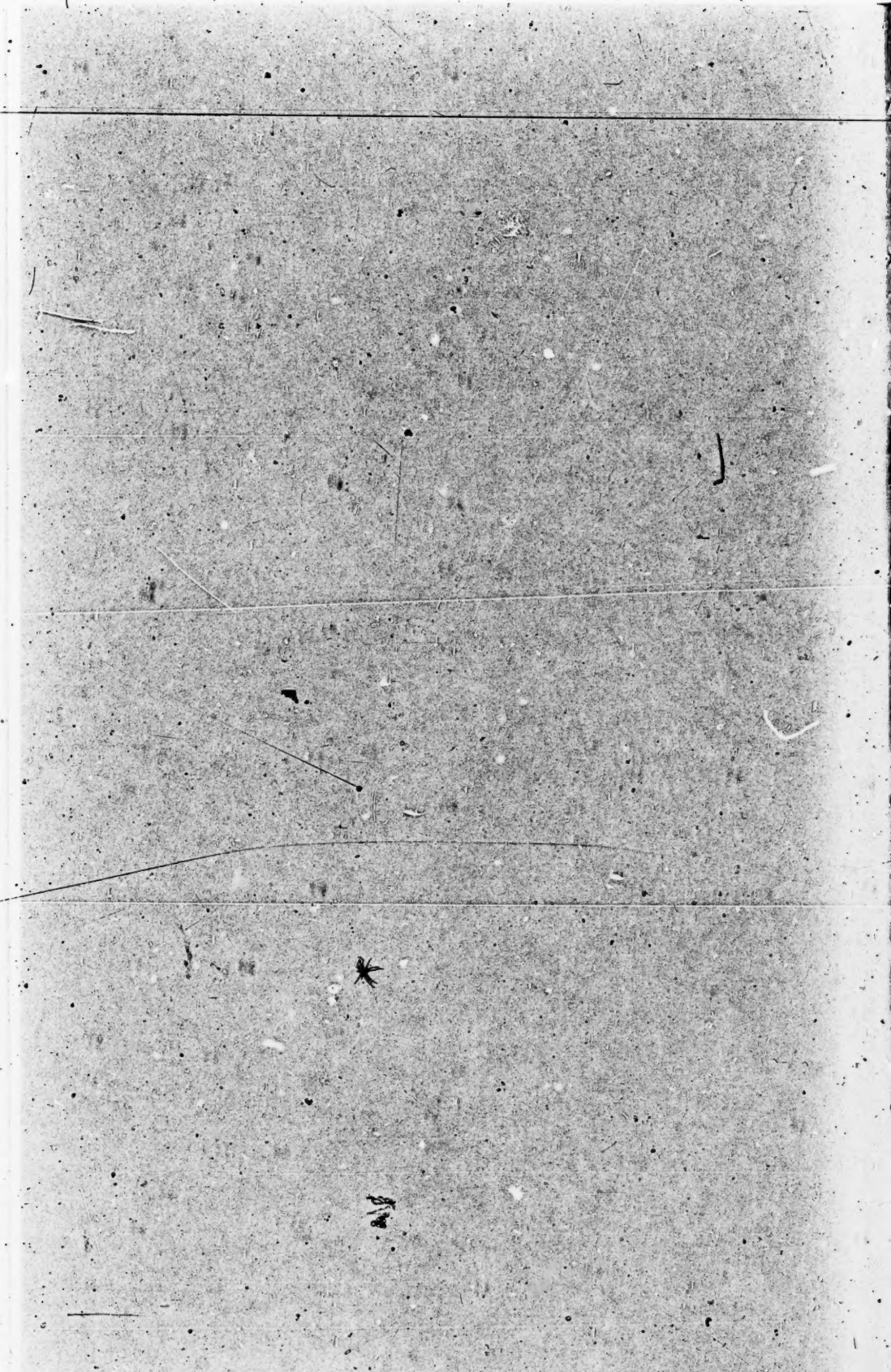
UNITED STATES OF AMERICA,
and
INTERSTATE COMMERCE COMMISSION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

PETITION FOR REHEARING

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IN THE

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Appellant,

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UNITED STATES OF AMERICA,
and
INTERSTATE COMMERCE COMMISSION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

PETITION FOR REHEARING

The appellant, for the reasons ~~hereinafter stated~~; respectfully petitions the Honorable Court to rehear its decision entered herein April 18, 1960, granting appellees' motion to affirm and affirming the judgment of the distri. court.

STATEMENT

This is an action, commenced in the district court, to vacate and set aside a decision of the Interstate Commerce Commission which held that a certificate of public convenience and necessity purchased by appellant must be restricted to a one-way movement, with respect to certain points, even though the certificate provides that movements may be made "to and from" such points. The three-judge statutory court decided that the complaint should be dismissed, and this direct appeal followed.

After the filing of appellant's Jurisdictional Statement and the docketing of the appeal, appellees filed their motion to affirm, which motion, as stated, the Court granted on April 18, 1960.

WHY THE PETITION SHOULD BE GRANTED

With great deference to the Court's views in granting appellees' motion to affirm, appellant respectfully submits that the Court below is in error and that the questions involved are of substantial importance, not only to appellant but to the motor carrier industry as well, and that therefore opportunity should be granted for full hearing on the merits.

In its Jurisdictional Statement appellant fairly demonstrated that the words "to and from" had been construed by its predecessors and by even opposing carriers as clearly conferring the right to make for-hire transportation movements in both directions. The phrase consists of such simple English words that no one should seek to interpret it as meaning only half of what it says. That is exactly what the Commission did in its decision which is here in dispute. In its Jurisdictional Statement, appellant discussed this

question at some length, but it does not seem appropriate here to reiterate such discussion.

In its motion to affirm, appellees refused to meet the above point head-on. Rather, they sought the shelter of the principle sometimes announced by this Court that only where the Commission's decision is arbitrary or capricious will it be disturbed. Appellant does not challenge this as a proposition of law. It is appellant's position, however, that this record affords no room for the application of that principle. The correct criterion to be applied is that where, as here, the Commission's decision is plainly erroneous, appellant is entitled to the protection provided by the Administrative Procedure Act, 5 United States Code Sections 1001, 1009(e). See *East Texas Motor Freight Lines, Inc., et al. v. Frozen Food Express et al.*, 351 U.S. 49, 54 (1956); *Chicago M., St. P. & P. R. Co. v. Moutti Peat Products, Ltd., et al.*, 253 F. 2d 449, 454 (9th Cir. 1957); *Grace Line, Inc. v. Federal Maritime Board*, 263 F. 2d 709, 711 (2d Cir. 1959).

If appellant is correct in its contention that the Commission plainly erred in deciding that the phrase "to and from" means exactly the same thing as if only the word "to" appeared in the certificate, then it is easy to see that a power greater than was ever contemplated by the Congress is to be found in the Commission. In its decision the Commission said that the phrase was without ambiguity and that it meant one way only. The district court, however, held that the phrase was ambiguous. It is appellant's contention, on the other hand, that the district court erred in its view that "to and from" is ambiguous, and that the Commission was correct in saying there was no ambiguity, but *incorrect* in deciding that the phrase means the same thing as if the words "and from" were deleted. Actually, the question seems so simple that there should have been

no doubt about the matter—as indeed there was none, until the Commission, out of a clear sky, inserted its restrictive interpretation when the matter reached it on the second hearing of the purchase proceedings. If it is within the power of the Commission to strip the flesh and blood from a certificate by interpretation in derogation of the plain words of the certificate, then there must be hundreds of motor carriers whose certificates are in jeopardy.

In its motion to affirm, appellees urged that under the doctrine announced in *Callanan Road Co. v. United States*, 345 U.S. 507, appellant is estopped from challenging the Commission's decision. In that connection, appellees asserted that the district court was in error in holding, as it did, that the *Callanan* Case did not rule the case at bar, because, unlike the situation in the *Callanan* Decision, a direct attack has been made here. While, as this Court can appreciate, appellant has no way of knowing just why the Court sustained appellees' motion to affirm herein, nevertheless appellant wishes to emphasize that the *Callanan* Case has no application here. The district court's opinion fully and correctly distinguishes that decision.

Lastly, it must be pointed out to the Court that if appellant is correct in its contention that a two-way compensatory operation is in fact accorded by the certificate purchased by appellant, then a most serious injustice has been done. The Court knows as a matter of common knowledge that any trucking business which permits the carrier to operate for hire in only one direction is inefficient and most uneconomical. The record is clear that when appellant contracted to buy the operating rights in question, appellant and the seller—and even the opposition carriers—thought beyond question that a two-way operation with respect to the disputed intermediate and off-route points was granted

by the certificate. Therefore, it is obvious that when the Commission whittled these rights in two, appellant received appreciably less than what it had bargained for. It follows that by consummating the purchase, after years of litigation before the Commission, appellant may not rightly be said to be estopped from challenging the Commission's decision with respect to the point involved in this appeal. Before estoppel may be asserted against appellant, someone must be shown to have suffered as a result of appellant's acts or omissions. No such thing may be demonstrated here.

WHEREFORE, appellant respectfully prays that this petition for rehearing be granted and that the Court's said decision of April 18, 1960, be set aside.

Respectfully submitted,

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